United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

to be argued by
JOSEPH I. STONE

B
P/S

75-1214

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

75-1214

UNITED STATES OF AMERICA,

Appellee,

-vs-

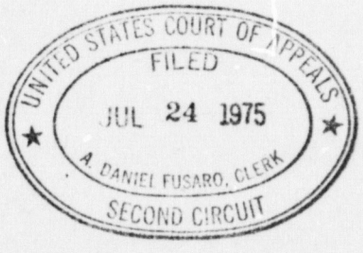
ARTHUR STEWART,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX FOR DEFENDANT-APPELLANT, ARTHUR STEWART



JOSEPH I. STONE, ESQ.
Attorney for Defendant-Appellant
Office & P. O. Address
277 Broadway
New York, New York 10007

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I N D E X

Cases Cited

STATUTES

PRELIMINARY STATEMENT

The appellant, Arthur Stewart, appeals from a judgment of the United States District Court, Southern District of New York, before Honorable Irving B. Cooper, U.S.D.J., and a jury, of the crime of bank robbery in violation of Title 18, U.S.C., Section 2113(a) and 2113(d). The appellant was sentenced on May 22, 1975, to a term of forty-five years in prison for study and evaluation pursuant to Title 18, Section 4208(b). Appellant is currently incarcerated for this study and evaluation.

The undersigned was appointed by United States Magistrate to represent Arthur Stewart as an indigent defendant on February 20, 1975 and this Court continued the appointment by order dated June 6, 1975.

STATEMENT OF FACTS

On February 19, 1975, at approximately 7 P.M., the police of the 48th Police Precinct received a telephone call that a bank "robbery" was in progress at the Eastern Savings Bank located at 1920 Webster Avenue, Bronx, New York. Officer George E. Greader and Sgt. James Mulroy responded to this call. Officer Greader left the police vehicle, walked toward the bank, apporached the

defendant and noticed first that the defendant had his hand in his pocket and secondly, that he was carrying bags (48R). The defendant was arrested at that time. A firearm was removed from the defendant's coat pocket and a blue duffel bag and a green and white plastic bag were taken from the defendant's hands.(49, 50R). In the vicinity of the arrest of the defendant and the seizure of the two bags, Officer Greader picked up two plastic rubber gloves (51R). The examination of the bags carried by the defendant revealed $20,575.00 and various bank checks. Austin J. Duffy was called as a government witness to testify that he was an assistant vice-president and manager of the Eastern Savings Bank at Tremont and Park Avenues. Mr. Duffy identified certain sums of money as being "bait money" and some of this money was found in defendant's possession (89R). There are no cameras in the drive-in facility of the Eastern Savings Bank. The government's other witness was Mr. Sergio Rivera, who testified that he was an employee of the Veterans Detective Bureau (10R), whose general duties were to "guard the place, watch the cars in the parking lot" (11R). He testified that as he began to close the gates of the bank, two men came over and informed him that it was a holdup, took the gun from the holster and told him to "lay down on the floor and don't move your head." (19R). Mr. Rivera also testified that on the

day before this bank "robbery", the defendant came to the window of the bank, grinned and gritted his teeth (21R).

Prior to trial, the government made known to the attorney for the defendant that Mr. Rivera, the teller, Mr. Hudson and another person, Mr. Anglada, had not identified the defendant. The defendant was aware that Hudson could not identify him as a perpetrator of the bank robbery. However, it was not until the attorney for the defendant actually called Hudson to the stand as a defense witness that it became known that Hudson and the defendant had known each other for many years. Hudson testified that only one person held him up (96R), that he didn't see his face nor his clothing, that he was never shown a photograph (96, 97R). Hudson was also asked if he ever identified the person who was arrested in front of the bank and he answered "no" (98R) and he also stated that he couldn't identify the person who was arrested in front of the bank as being in the courtroom that day (98R). Hudson also testified that he didn't notice a gun in his hand (104R). Hudson testified that he knew Stewart, they grew up together and he knew him by name but he did not recognize him as seeing him that night (107R). At the conclusion of Hudson's direct testimony, counsel asked for any of Hudson's reports or statements and after government

objection, the court viewed them "in camera" and filed them as a court exhibit. After Hudson's conflicting testimony which indicated that there might have been "collusion" between Hudson and the defendant, a request was made for the judge to charge that if the defendant was in collusion with Hudson, he could not have been guilty of a bank "robbery". The judge refused this request. Mr. Anglada testified that he viewed the robbery in progress, saw a meeting of the robbers and he went to Frank's Sporting Goods, made a phone call (207R). Anglada also testified that he saw three men participate in the robbery or the post-robbery discussion. Anglada also testified that he came back to the vicinity of the bank and he told the police that he did not see the defendant before (209R). The government also called F.B.I. Agent Coulson to testify about exculpatory statements made by the defendant. The defendant himself testified, admitted certain discrepancies and in an exculpatory statement claimed he had the gun as protection and he was going to visit a friend, James Bell. He stated that he saw the bags of money being dropped,picked them up and was arrested. James Bell testified that they had a previous commitment to meet at that time in the Bronx. Exceptions were dutifully taken to certain portions of the judge's charge and are preserved for appeal purposes.

QUESTIONS PRESENTED

POINT I

DID THE COURT'S CHARGE PRECLUDE THE JURY FROM VITAL DEFENSE THEORIES?

POINT II

WERE THE CONTRADICTIONS AND AMBIGUITIES IN THE CHARGE PREJUDICIALLY CONFUSING TO THE JURY?

POINT III

IS AN EMPLOYEE OF THE VETERANS DETECTIVE BUREAU A "PERSON" COVERED BY THE STATUTE?

POINT IV

DID THE GOVERNMENT FAIL TO LIVE UP TO "BRADY VS. MARYLAND"?

POINT V

MERE POSSESSION OF STOLEN PROPERTY IS NOT SUFFICIENT.

POINT VI

DID THE COURT ERR IN ADMITTING "ABANDONED GLOVES" INTO EVIDENCE?

POINT I

DID THE COURT'S CHARGE PRECLUDE THE JURY FROM VITAL DEFENSE THEORIES?

Appellant requested several corrective instructions to the Court's charge (R. p 338 thru 341), which were denied.

A. COLLUSION

The requested charge on collusion, if given, would have allowed the jury to find that the Government had not met its burden of proof on all of the essential elements of 18 USC 2113 (a); 2113 (b).

If the bank teller, HUDSON, were involved in the theft, then, as to him, there can be no question of force, violence or intimidation. A jury could very well find also, under a suitable indictment, that there was an embezzelment not a robbery or taking.

The testimony of HUDSON is replete with suspicious peculiarities. He failed to exhibit a normal apprehension or even suspicion when someone bought a one dollar money order, at closing time, and just continued to stand at the window without even picking up the money order. HUDSON did not bother to check by question or even a glance before opening his door to the thief. In the eight or nine minutes during which the money was put into the bank bag by him, he claims that he never once caught a glimpse of the thief. This despite the fact that there was considerable movement in and out of the room and to and from the lavatory.

HUDSON failed to press the alarm, even after the thief had left. He lied when he said he did not recognize appellant as the police frisked appellant, since he knew appellant from boyhood. And, if appellant, (suggested as a possibility by the Government and the Court), was the one who bought the money order, this lying was clearly perjury. It is conceded that each of these items, singly or severaly can be consistent with innocence. Yet, the Court, itself, considered collusive guilt as a possibility when it said "You are not here to determine whether the teller tipped them off, or had a part in it, or whether he was wholly innocent (R p. 289). So too did the Government (R p. 275).

The refusal to permit the jury to consider this same possibility of collusion is most prejudicial to appellant. If the jury could have considered the defense of collusion, it might have also found that the Government had failed to meet its burden of proof beyond a reasonable doubt as to the key words in the indictment; "Taking", "Robbery", "Force, Violence or Intimidation".

These possible effects of proof of collusion can explain why the Government did not call the bank teller, HUDSON, as a witness. It would normally be expected that he would be a prime Government witness. The results of compelling the defense to call him was to prevent the defense from procuring available 3500 material and as a practical matter, to shift the burden of proof

to the appellant.

B. AIDING AND ABETTING

The refusal to charge that something more must be shown to connect appellant to the rest of the gang than his mere presence and possession of the money, was also prejudicial. It left the jury with little choice but to reject appellant's story. It precluded any argument, based on collusion, that, assuming appellant was a member of the gang, no force was ever contemplated since there was no need for force. It also precluded the jury from considering the possibility, remote under the evidence, but nevertheless a possibility, that the action of the guard in allowing the two men to enter the parking lot was also collusion. Further, there was no evidence that the parking lot belonged to the bank. A 250 car parking lot is not such a normal adjunct of a bank that no proof is needed. If that be a possibility, then he might have been on parking lot business while closing and any action by the gang as to him was not within the scope of a planned robbery. In any event, if the jury could have found collusion, then of course, the alleged violence as to the guard was a sham.

POINT II

WERE THE CONTRADICTIONS AND AMBIGUITIES IN THE CHARGE PREJUDICIALLY CONFUSING TO THE JURY?

A. CONTRADICTIONS

a) The Court charged that the jury was to bring in separate verdicts of guilty or not guilty on each of the two counts (R p. 334). The Court, however, also charged that the jury must find appellant guilty on Count I before it can do so on Count II (R p. 308).

It is patent that such instructions can be sufficiently confusing to cause a jury to find guilt on Count I simply to support a guilty finding on Count II. This is substantial error.

b) After the Court defined the four elements of the crime under the precise wording of the statute, it went on to say that "....lets go to the fourth element because I don't think you will have too much difficulty with the first three" (R p. 305). Despite full and repeated cautions as to reasonable doubt, what does the Court's statement mean? That there is such understanding of these elements that the jury can readily make a choice or, that the issues are so clear that no choice is required? There is no way of knowing which the jury understood and acted upon.

B. AMBIGUITIES

a) In illustrating the concept of credibility, the Court said that the testimony of agent COULSON

"...who gave what you might consider vital testimony, what was his motive? Although the

defense has not suggested it, did he perjure himself in order to get the defendant convicted? Did he perjure himself because he doesn't like the defendant's color? Was his testimony induced by an unflinching desire to do his full duty"(R p. 330). Is this statement simply a forceful and dramatically literate example as intended or can it reasonably be understood by the jury as a choice between a wholly dedicated policeman and a racially bigoted, unethical one. Appellant did not raise this problem. Appellant is prejudiced because the jury might have been foreclosed from evaluating COULSON'S testimony as coming from a normal human, subject to normal human weskness and strength, nor more and no less.

b) The Court charged that there was no contest that a robbery took place on February 19th and that money was taken from the bank employee (R p. 304). This language is wholly incorrect and misleading. One of the major defense arguments was that if there were collusion by HUDSON there could not be a "robbery" or a "taking". It is most respectfully submitted that this is prejudice per se, amounting to plain error. (Rule 52, F.R.C.P.).

c) The Court also failed to charge the jury that the robber(s) must have had the objective capability of causing physical harm by the means threatened. In this case Stewart had a gun without bullets. (U.S. v. Stewart 513 F2nd 957) citing U.S. v. Marshall 427 F2nd 434.

POINT III

IS AN EMPLOYEE OF THE VETERANS DETECTIVE BUREAU A "PERSON" COVERED BY THE STATUTE?

The Government has the burden of prooving all aspects of the statute including whether or not "a person" subject to force and violence is one defined by the statute. "when a person.....by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, or any savings and loan association.....2113(a).. In this situation if Sergio Rivera were a general employee guarding the parking lot whose duties were not specifically to guard the bank, then the defendant Stewart could not be convicted under this statute. (US v. Marx 485 F2nd 1179).

POINT IV

DID THE GOVERNMENT FAIL TO LIVE UP TO "BRADY VS. MARYLAND"?

The Government furnished defense counsel with a letter indicating that certain witnesses could not identify Stewart as having committed the crime. These three people were Rivera, Hudson and Anglada. The Government failed to state that Hudson knew Stewart for "most of his life", and failed to furnish the defendant prior to trial all of Anglada's sculpatory testimony. Although both Hudson and Anglada were called I can candidly state that I was overwhelmed and surprised by Hudson's answer

at trial and might have proceeded completely differently had the Government given me the full impact of Hudson's testimony including Hudson's statement which was requested at the time of trial and denied by the Court as not being within the provinces of "3500 material".

POINT V

MERE POSSESSION OF STOLEN PROPERTY IS NOT SUFFICIENT

In U.S. v. Jones 418 F2nd 818 the 18th Circuit found that the charge was improper and is further prejudicial to the defendant under the Aiding and Abetting charge outlined above where the Court stated "there is no corrabative circumstance beyond possession of the bills which in any way ties the defendant to the crime itself.

POINT VI

DID THE COURT ERR IN ADMITTING "ABANDONED GLOVES" INTO EVIDENCE?

Immediately after defendant Stewart's arrest, certain gloves were found by the arresting officer near the bus. They were admitted over objection (56r). The officer admitted that he did not see the gloves dropped (66r) and to admit them against defendant Stewart considering all the unusual and extenuating circumstances of this case, further guarantees that he did not receive a fair trial and was error.

CONCLUSION

The Court's charge was erroneous and prejudicial; the proof failed to conform to the statute; the Government failed to follow the Brady doctrine and the defendant was deprived of a fair trial requiring a reversal of the judgment of conviction and a dismissal of the indictment.

Respectfully Submitted,

JOSEPH I. STONE
Attorney for the Defendant
277 Broadway
New York, New York

Index to Appendix

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-v-

ARTHUR MICHAEL STEWART,

Defendant.

---

75 CRIM. 206

INDICTMENT

75 Cr.

COUNT ONE

The Grand Jury charges:

On or about the 19th day of February, 1975, in the Southern District of New York, ARTHUR MICHAEL STEWART, the defendant, unlawfully, wilfully and knowingly, by force, violence, and by intimidation, did take and did attempt to take, from the person and presence of another, property and money in the approximate amount of $20,575.00 which belonged to, and was in the care, custody, control, management and possession of the Eastern Savings Bank, 1920 Webster Avenue, Bronx, New York, a bank the deposits of which were then and there insured by the Federal Deposit Insurance Corporation.

(Title 18, United States Code, Section 2113(a) and 2.)

COUNT TWO

The Grand Jury further charges:

On or about the 19th day of February, 1975, ARTHUR MICHAEL STEWART, the defendant, in committing and attempting to commit the offense charged in Count One of this Indictment, did assault a person, and did put in jeopardy the life of a person by the use of a dangerous weapon and device, to wit, a firearm.

(Title 18, United States Code, Sections 2113(d) and 2.)

Form No. USA-33s-274 (Ed. 9-25-58)

ed States District Court

OUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

vs.

HUR MICHAEL STEWART,

Defendant.

INDICTMENT

75 Cr.

le 18, United States Code,
tion 2113(a)(d) and 2.

L J. CURRAN

United States Attorney

UE BILL

Foreman

FPI—883—1-13-70—20M—4925

APR 28 1975 Jury trial began Before:

APR 29 1975 Trial Continued.

APR 30 1975 Trial Continued. Jury Verdict
Guilty on both Counts. Jury
Polled. Verdict Recorded.

MAY 22 1975

CRIMINAL DOCKET
UNITED STATES DISTRICT COURT

75 CRIM. 206

D. C. Form No. 100 Rev.

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	*For U. S.:* Frederico E. Virella AUSA 791-1950
vs.	
ARTHUR MICHAEL STEWART	6/9/75
	For Defendant:

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	DISB.
(01)						
J.S. 2 mailed	Clerk					
J.S. 3 mailed	Marshal					
Violation	Docket fee					
Title 18						
Sec. 2113(a)(d)&2						
Bank robbery. (Ct.1)						
Armed bank robbery. (Ct.2)						
(Two Counts)						

DATE	PROCEEDINGS
2-23-75	Filed Indictment.
3-4-75	Deft. present (Atty. present) enters a plea of not guilty, 10 days for motions. Bail fixed by Magistrate at $25,000 cash or surety continued. Deft. remanded in lieu of bail. Lasker,J. Case assigned to Griesa,J. for all purposes.
3-6-75	Filed Notice of Appearance - Joseph I. Stone, 277 B'way, NYC Tel # 732-2270
4-28-75	Jury Trial begun Before Cooper J.
4-29-75	Trial Continued.
4-30-75	Trial Continued, Jury Verdict Deft. guilty on both counts. Jury Polled motions made & Denied. Pre sentence report Ordered. Probation Notified. sentence May 22,1975 at 11:a.m. Deft. Remanded. Cooper J.

DATE	PROCEEDINGS
5-1-75	**Issued Remand**
5-22-75	Filed JUDGMENT & COMMITMENT (atty present) . The deft. is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment pursuant to Section 4208 (b) of Title 18, U.S. Code, for study, report and recommendations as described in Section 4208(c) . This Commitment is deemed to be for the maximum sentence of Forty-five (45) Yearsand a fine of $15,000.00 prescribed by law, unless altered pursuant to said section upon receipt of the report & recommendations. The results of such study, together with any recommendations which the Director of the Bureau of prisons believe would be helpful in determining the disposition of the case, shall be furnished to the Court within Three (3) Months.. . . .Cooper,J.
	Issued Commitment 5-29-75
6-4-75	Filed deft's. notice of appeal from the judgment of 5-22-75 with MEMO ENDORSEMENT. Deft's. application to proceed on appeal in forma pauperis is granted....Cooper,J. Mailed notice to Joseph I. Stone, 277 B'way.N.Y.C. and U.S. Attorney's Office.

United States District Court for

United States of America vs. ARTHUR MICHAEL STEWART — DEFENDANT

SOUTHERN DISTRICT OF NEW YORK

DOCKET NO. ➤ 75 Cr.206

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date ➤ MONTH 5 DAY 22 YEAR 75

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL Joseph I. Stone, Esq. (Name of counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [ ] NOT GUILTY

FINDING & JUDGMENT

There being a ~~######~~ verdict of [ ] NOT GUILTY. Defendant is discharged [X] GUILTY. in each of Counts 1 & 2

Defendant has been convicted as charged of the offense(s) of unlawfully, wilfully and knowingly, by force violence, and by intimidation, did take and did attempt to take property and money which was in the custody, control of the Eastern Saving Bank. The defendant did assault a person, and did put in jeopardy the life of a person by use of a dangerous weapon, to wit, a firearm. Title 18, U.S. Code. Section 2113 (a) and (2). also title 18, U.S. Code Sections 2113(d) and (2).

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment ~~##########~~ pursuant to Section 4208(b) of Title 18, U.S. Code, for study, report and recommendations as described in Section 4208(c). This Commitment is deemed to be for the maximun sentence of Forty-five (45) Years and a fine of $ 15,000.00 prescribed by law, unless altered pursuant to said section upon receipt of the report and recommendations. The results of such study, together with any recommendations which the Director of the Bureau of prisons believes would be helpful in determining the disposition of the case, shall be furnished to the Court within Three(3) Months.

SPECIAL CONDITIONS OF PROBATION

ADDITIONAL CONDITIONS OF

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke

FOR THE SECOND CIRCUIT

X UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF NEW YORK.

UNITED STATES OF AMERICA

-v.-

CRIM. NO. 75 Cr. 206

JUDGE COOPER

A [illegible]

Y

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6-A

EXCERPTS FROM TESTIMONY

S E R G I O R I V E R A, called as a witness, having been duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. VIZCARRONDO:

(10R)

Q By whom are you employed?

A Veterans Detective Bureau.

(18R)

Q What happened when he went outside to lock the gates?

A I went to the gate, the Park Avenue gate, and as I started closing the gate, two men come over. They asked me if they can cross over...

(19R)

And then he walked me down halfway to the parking lot and told me to "Lay down on the floor and don't move your head. If you move your head I'm going to blow it off."

(20R)

Q Directing your attention to February 18, 1975, the day before the robbery, what were you doing at about five minutes before 7 P.M. in the evening?

(21R)

A I was sitting inside the drive-in bank.

Q What did you observe at that time?

A I observed a man passing by the window grinned and gritted his teeth to me.

G E O R G E E. G R E A D E R, called as a witness, having been duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. VIZCARRONDO:

(48R)

Q What did you notice?

A I noticed, the first thing, that he had his hand in his pocket. The second thing I noticed was that he was carrying bags.

(49R)

Q What did you do next?

A I felt the gun, Sergeant Mulroy had come around from behind the bus at this time and was behind the defendant. I yelled to Sergeant Mulroy that he had a gun, and I again told the defendant not to take his hand out of his pocket. I put my hand in his pocket and I removed the firearm from his coat pocket.

THE COURT: Which pocket are you talking about that his hand was in.

THE WITNESS: The right coat pocket.

THE COURT: And you are talking about his right hand being in his pocket?

THE WITNESS: That's right.

THE COURT: You said a few moments ago that he was carrying two bags. Will you describe the bags?

THE WITNESS: One bag was a blue duffel type bag, and the other was a green and white plastic bag.

(50R)

Q Where were the bags at this time?

A The bags were in his hand when I first confronted him, and they remained in his hand until I got him back up on the sidewalk.

Q What happened to them then?

A When I felt the gun, and after I had yelled to Sergeant Mulroy and told him that the man had a gun, I looked at him and I told him to drop the bags right where he was.

Q Where did he drop the bags?

A He dropped the bags right where he was standing which was the curb line.

Q Did you pick up anything else at thattime?

(51R)

A Yes, I did.

Q What did you pick up?

A I picked up two plastic rubber type gloves.

Q Where were they located exactly?

A They were located in the same vicinity as the bag.

(56R)

A They are yellow plastic gloves, and they are marked with my initials.

Q What are they?

A They are the gloves that I took from the street that night in front of the bank.

Q As you arrested the defendant?

A Yes.

Q Did you mark the gloves?

A Yes.

Q Where?

A In the station house.

MR. VIZCARRONDO: The government offers Exhibits 4, 5 and 6 for identification.

MR. STONE: May I inquire, your Honor?

THE COURT: Certainly.

(57R)

Q Did you ever submit these gloves to fingerprint analysis?

A No, sir.

MR. VIZC ARRONDO: Objection, your Honor.

THE COURT: I will allow the answer to stand.

MR. STONE: I would object. There is no connection between the defendant and these gloves. I have no objection to the other two items.

A U S T I N J. D U F F Y, called as a witness, having been duly sworn, testified as follows:

(89R)

MR. STONE: All the bills that were bait money were among those found.

THE COURT: How is it? I don't know, you know.

MR. VIZCARRONDO: Your Honor, a portion of the money that was taken from the defendant's possession was bait money; not all the money was bait money.

T Y R O N E H U D S O N, called as a witness, having been duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. STONE:

(96R)
Q How many people held you up?

A One that I --

Q One. That's all right.

(97R)
Q How long did he face you?

A He didn't face me.

Q Did you observe the clothing of this individual? Yes or no.

A No, I didn't.

(98R)
Q Were you shown any photographs?

A No.

Q You were never shown any photographs?

A No, no.

Q Did you ever identify that person?

A No.

Q Do you see that person in court today?

A Again, I'm really not sure, you know. No, I didn't see him.

Q Look around the courtroom and tell me if you saw the person that was arrested in front of the bank after the holdup.

(99R)
A No.

(104R)
Q Did you see a gun in his hand?

A No. I didn't notice any gun. I guess I wasn't looking.

(107R) MR. STONE: Mr. Stewart, will you stand up.

Did you ever see this individual before?

A Yes.

Q When?

A We grew up together.

Q You have known him?

A Yes.

Q Do you know him by name?

A Sure.

Q Well, I asked you earlier if you recognized anybody in this courtroom as being present on that night?

A Right.

Q Mr. Stewart is also in the courtroom; did you see him that night at all?

A No -- can I elaborate, or what?

(108R) THE COURT: I wish you would answer the question. Did you see him that night? That means anywhere in the world, Mr. Hudson.

THE WITNESS: No.

THE COURT: Did you see him?

THE WITNESS: No.

L U I S F. A N G L A D A, called as a witness, having been duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. STONE:

(207R)

Q You noticed what?

A ...So then they start, They have revolver in their hands. They took the revolver and start pushing the guard down the alley down there, down the alley down there.

And I get off from my car, and I went to Frank's Sporting Goods --

THE COURT: You went where?

THE WITNESS: To a sporting goods store.

A -- about 15 feet away from where I was. I run across the street, went there and I told him to call the police.

THE COURT: Don't tell us what you told him. What else did you see, if anything?

(208R)

THE WITNESS: ....I run back right away to my position where I was with the car, and I noted thatthe door was open already from the bank, and I drive my car to the other street where is the main entrance of the bank, and suddenly the police had this man already with his hands on the bus, with the shopping bags.

(209R)

And they asked me if I saw that man before, and I told them no.

(275R)

Colloquy MR. VIZCARRONDO: ...Mr. Hudson also testified that he has been a friend of the defendant's since childhood.

You can draw your own conclusions on this. Maybe Tyrone Hudson was in on this bank robbery. Maybe Tyrone Hudson looked at this friend and saw that he was the bank robber and doesn't want to nail him, doesn't want to turn him in. Maybe Tyrone Hudson was telling the truth and just didn't take a look at the man. But whatever, if Tyrone Hudson was a confederate, was a part of this bank robbery, or if he was covering up for the defendant by saying he didn't look at the man, or if he was telling the truth, none of those stories proves that the defendant is guilty, and also -- proves that the defendant is not guilty and all of them prove the defendant's guilt because if Tyrone Hudson was his confederate, was a member of the gang, the defendant is guilty, and if Tyrone Hudson is covering up, the defendant is again guilty, and it is the defendant that's on trial here and not Tyrone Hudson.

(In the robing room.)

THE COURT: Then off the record discussion, counsel being helpful on both sides, I take it that the government withdraws supplemental request number 2 entitled "Uncalled witness (equally available to both sides)," so that is withdrawn.

Now Mr. Stone, will you please recite which requests you object to and give at least a brief statement as to your position with respect to your objections.

MR. STONE: I object to request number 2, item 4. It is my position that in any of the assault, force or violence allegations there is no evidence whatsoever that the defendant did anything forcefully by violence or by intimidation and I accordingly object to that to keep in line with the motions I made at the conclusion of the government's case.

Accordingly I also object for the same reasons to requests numbers 3, 4, 5, 6 -- for those reasons.

THE COURT: All right. Does the government wish to be heard?

MR. VIZCARRONDO: Your Honor, merely to state that the defendant is charged in both counts with aiding and abetting and the government has requested that the court instruct the jury on aiding and abetting, so therefore the

requests objected to are appropriate.

THE COURT: The objections as to each request are overruled. The court will charge in essence, if not word for word, everything that appears in the government's requests 1 to 6 inclusive because that's as far as we have gotten.

Now we go to request number 7. Is there any objection?

MR. STONE: Well, of course.

THE COURT: In substance, to that?

MR. STONE: I don't feel there is any evidence of aiding and abetting. However, if the government's claim is aiding and abetting, this is a correct recitation of the law on aiding and abetting. My position to be consistent is that he didn't aid and abet anyone, so of course I object.

THE COURT: All right, the objection is overruled and the court will grant request number 7 in substance if not word for word.

Now we come to request number 8, wilfully and knowingly. In the off the record discussion you said that you had no objection but you hoped that I would enlarge upon it, is that not your position?

MR. STONE: That's correct.

THE COURT: I shall enlarge upon it.

Now request number 9, have you any objection to circumstantial evidence?

MR. STONE: No objection.

THE COURT: Therefore there is no objection to 9. 10, credibility and impeachment of witnesses.

MR. STONE: That's correct on the law.

THE COURT: Prior convictions.

MR. STONE: I'm stuck with it.

THE COURT: 12?

MR. STONE: I think that's a correct statement of the law.

THE COURT: 13?

MR. STONE: I think that's also a correct recitation of the law.

THE COURT: 14?

MR. STONE: I would object to it.

THE COURT: The objection is overruled.

MR. STONE: If you do give it I would ask you to give it in the middle or the beginning of the charge rather than the end.

THE COURT: No. I shall give it where I think it is appropriate.

MR. STONE: And I would object to 15.

THE COURT: And you object also to 15. The

objection is overruled. The court will so charge.

The government has a list, request number 16 and I presume you have no objection to the court charging with any of those items?

MR. STONE: No objection. On C I think that it is covered in false exculpatory statements rather than as an admission. There was no direct evident of the defendant's admission. I don't think they can have the charge both ways.

THE COURT: What does the government say to that?

MR. VIZCARRONDO: I'm not quite sure I understand the objection.

THE COURT: He objects to the word admissions. He says there were no admissions.

MR. VIZCARRONDO: Well, your Honor, I think that the defendant has admitted some things and he has made false exculpatory statements as to others.

THE COURT: Objection overruled. Then A to G will be charged as indicated in request number 16. So to sum it up, the court overrules all the objections interposed by the defendant and will grant word for word or in substance what is embraced in these requests to charge, 1 to 16 both inclusive as well as supplementary requests number 1.

MR. STONE: Are you going to marshal any evidence

in this short case?

THE COURT: I do not marshal evidence in a case such as this. You gentlemen have delineated the issues of fact so sharply that it is entirely unnecessary for the court to do that. I shall emphasize the things that I think warrant emphasis, and that is the propositions of law which fall on them for the first time and try to make them understand those propositions of law. We rattle them off because we are acquainted with them and we know of their significance, but the jury is going to hear for the first time what we mean by "aiding and abetting," what we mean by these requests of substance. That takes time, and I have never been one to believe that the elaborate, rather, the well constructed language which announces the propositions of law is sufficient. I sometimes find that that needs embellishment, and needs breaking down into simple terms that the lay person, at least one of the jurors didn't need more, need to understand, and that's what takes time.

So, I will have plenty of things to do other than interfere with the facts. That I leave to you.

You gentlemen have agreed that your summation will take from 20 minutes to a half hour but not more than a half hour, and that is certainly satisfactory.

We meet at 9:30, and I hope that if Bell isn't

here you will swing right into the summations and then the charge of the court because it usually takes me much longer than you are accustomed, I'm afraid. It is only because I insist on what I call breaking down the language so as to have it comprehensive. So that if you will cooperate as I know you will, we will have this whole thing wrapped up and in the hands of the jury, they will then go to lunch in the custody of the marshal, come back from lunch and enter upon their deliberations. I wouldn't like anything to interfere with that.

(Discussion off the record.)

(Adjourned to April 30, 1975, at 9:15 A.M.)

UNITED STATES OF AMERICA
v.
ARTHUR MICHAEL STEWART

April 30, 1975,
9:15 A.M.

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(In the robing room.)

THE COURT: Gentlemen, I gave further consideration to our discussion in the robing room yesterday and I have decided that, in addition to aiding and abetting, I should charge the law relating to common plan, the essence of which you are both aware of, and that is that the evidence with regard to the joint venturers is binding or applicable to each person in the common plan. There is enough for me, I think, to indicate the point that I intend to enlarge upon and make clear to the jury.

MR. STONE: I would of course object, your Honor, as I did on the aiding and abetting. I feel that one charge which encompasses the possibility of acting in concert is more than sufficient, and two charges that would encompass the possibility of acting in concert would be unfair to the defendant completely.

THE COURT: Very well. Anything further?

MR. STONE: Yes, I have two requests at this last moment that are very simple. One, I ask you to charge that

possession of the gun itself is not evidence of guilt.

And two, if you find that the defendant and the bank employee were in agreement to steal and embezzle federal funds, then you cannot convict the defendant of these charges.

MR. VIZCARRONDO: Your Honor, as to the first request, I would open it because I think that possession of the gun is evidence that the jury can consider in determining the defendant's guilt.

THE COURT: Or to determine whether he was a participant in the common plan.

MR. VIZCARRONDO: That's correct, your Honor.

The second request I would oppose, because even assuming the jury found that, they would not have to acquit the defendant because there is clear evidence that the bank guard was assaulted.

THE COURT: All right. The court rules that the defendant's requests are denied, each of these two requests. Is there anything else?

MR. STONE: No.

THE COURT: Now Mr. Stone, now that all the evidence is in, and you were good enough to agree to allow the government rebuttal testimony, let's move now in the belief that Bell will not be here so that all the evidence is in, and I will take all the motions that you wish to make

with regard to the government's case.

MR. STONE: I will renew all motions made at the close of the government's case and ask that the court enter a judgment of acquittal as to both counts.

THE COURT: Denied. This is done with the distinct understanding that if the witness Bell is here at 9:30, the case will be reopened and then we will take up the motions again at the close of the entire case at that particular time.

All right, thank you, gentlemen.

(Pause.)

MR. STONE: Your Honor, the gun situation disturbs me, and since your refusal of that charge, I would at least like some charge, basically one of the following: one, there is a statute in the federal law that carrying a gun to commit a federal crime is an offense in itself, and in that the defendant is not charged with that particular offense, I would ask for that charge, that the mere carrying of the gun is not evidence that he committed a federal crime, and he's not charged with the possession of a gun.

THE COURT: What is it that you want me to charge, that the defendant is not charged with the possession of a gun?

MR. STONE: I would like to let the jury be aware that there is a federal charge, a federal statute that is in effect today, that it is not a crime if a person is not using a gun to commit a federal offense. The gun would be a separate crime, and the defendant is not charged with that. The mere fact that he is in possession of a gun is not evidence that he committed the crime.

MR. VIZCARRONDO: Your Honor, I would oppose any reference to the fact that there is a federal statute --

THE COURT: That's out. What do you say about the mere possession of the gun is not evidence that he committed a crime relating to the carrying of a gun?

MR. VIZCARRONDO: Well, your Honor, if you charge that the defendant is not charged here with possession of the gun as a crime, I think that you will also have to charge that, however, the jury could consider the fact that the defendant, possessing the gun is evidence of his guilt on the charges that he is faced with here.

MR. STONE: I think your circumstantial evidence covers the gun situation. The jury should not be prejudiced by the fact that the defendant has a gun, and the fact of the mere possession of the gun alone is not evidence that he committed the assault or he committed the bank robbery.

THE COURT: Well, one of the big troubles with this

last minute request to charge -- and I have seen many unwarranted holocausts caused as a result of it and I try desperately to avoid it-is that here we have a situation where I repeatedly asked, what do you want the judge to charge? Let's have it in ample time so as to discuss it and to deal with the request coolly and dispassionately. The jury is here. They were told to be here at 9:30. I'm keeping them waiting really while we try to undertake what is the right thing to do here. We will have to do the best we can.

My offhand reaction is that the jury ought to be told that aside from this case, the mere possession of a gun, without more, an unloaded gun, without more, is not a crime, is not a federal crime. In other words, if a person is found on the street and he's got a gun on his possession, that in and of itself without more is not a crime. That I will charge.

MR. STONE: Fine.

THE COURT: Is that agreeable?

MR. VIZCARRONDO: That's agreeable, your Honor.

THE COURT: But I will add that the jury is to consider whether in connection with this case, and this common plan, which I shall define, the defendant carried the gun in connection with the furtherance or the execution of that common plan and his participation therein.

EXCERPTS FROM CHARGE

Page 289, line 12 to line 19....

"You are here to determine the guilt or innocence of this defendant and no one else. You are not here to determine the guilt or innocence of those who were there at that day in connection with that robbery which concededly did take place. You are not here to determine whether or not the teller tipped them off, of had a part in it, or whether he was wholly innocent."

EXCERPTS FROM CHARGE

Page 300, line 14 to line 19....

"After all, it hardly ever happens that the words spoken and the acts committed by a defendant charged with crime are recorded by photographs, and tape, and in addition thereto, a clearcut confession in defendant's own handwriting. That's in the story books. We wouldn't need a mature jury to resolve such a situation."

Page 304, line 15 and 16.....

"There has been no contest with regard to the contention that a robbery took place that day at that bank."

Page 305, line 6 to Page 306, line 7....

"Now, let's go to the fourth element, because I don't think that you will have too much difficulty with the first three. I don't need to have expansion on those first three elements that I mentioned outside of saying to you that each must be established beyond a reasonable doubt. Now the fourth element which is that the taking of the money must have been accomplished by force and violence or by intimidation. I can't develop this all at one time. I can see going through your mind, but there wasn't anything in the record that this defendant himself did anything of violence, or that this defendant himself took the money from the teller, but there is a proposition

of law relating to that situation which I shall develop as best I can shortly. Just be patient. Let's talk right now about the force, violence and fear that is contemplated by that element.

The government is not required to show that force and violence were actually used against anyone. If it proves beyond a reasonable doubt that the taking of the money was the result of intimidation, that is, the result of placing another person or persons in fear. For instance, if you find believable and credible the testimony of Rivera, the guard, as to what happened to him, and when he was told to lie down, face down, and that if he moved or did anything he would have his head blown off, or something to that effect. If believed, that's the intimidation that the law has in mind."

Page 308, line 21 to Page 309, line 13...

"I should observe that mere possession of an unloaded firearm without more is not a federal offense. However, its possession by defendant in this case may be considered by you as evidence of defendant's intent and purpose with respect to the robbery involved here.

For the immediate present, let us go to some definitions. What does the law mean by a dangerous weapon or device? It includes anything capable of being readily operated, manipulated,

wielded or otherwise used by one or more persons to inflict severe bodily harm or injury upon another person. So an operable firearm, such as a pistol, revolver, or other gun capable of firing a bullet or other ammunition may be found to be a dangerous weapon or device.

To put in jeopardy the life of a person by the use of a dangerous weapon or device means then to expose such person to a risk of death, or to the fear of death by the use of such dangerous weapon or device."

Page 311, line 9 to line 24.....

"Possession of property recently stolen, if not satisfactorily explained, is ordinarily a circumstance from which the jury may reasonably draw the inference and find in the light of surrounding circumstances shown by the evidence in the case that the person in possession knew the property had been stolen. So says the law. The law goes on and says, 'And possession of property recently stolen, if not satisfactorily explained, is also ordinarily a circumstance from which the jury may reasonably draw the inference and find, in the light of surrounding circumstances shown by the evidence in the case, that the person in possession not only knew it was stolen property but also participated in some way in the theft of the property'. Ordinarily the same inferences may reasonably be drawn from a false explanation of possession of recently stolen property."

Page 315, line 16 to Page 316, line 14....

"For example, if you find beyond a reasonable doubt that on February 19, 1975, a person other than this defendant entered the office of the Eastern Savings Bank where Tyrone Hudson was employed as a teller and forced Hudson at gun point to give him the money that was in the office, you must find this defendant guilty of the crimes charged in the indictment if you find beyond a reasonable doubt that he participated in the robbery and aided and abetted its commission by helping to subdue the bank guard standing as a lookout, or carrying away the proceeds of the robbery.

To give you another example, if you find beyond a reasonable doubt that the Eastern Savings Bank was robbed on February 19, 1975, by more than one man, and that one of those men at gun point forced the teller, Hudson, to give him the money that was in the bank office while other men helped subdue the bank guard or acted as lookouts and helped carry the robbery proceeds away, and if you cannot determine from the evidence before you who specifically played what role in this robbery, you must find this defendant guilty of the crime charged in the indictment if you find beyond a reasonable doubt that he participated in the robbery in any way."

Page 329, line 14 to Page 331, line 20....

"The fact that a witness is an official or an employee of

government does not mean by itself that you should give greater or special credit to his testimony. The testimony of any such witness should be weighed, scrutinized in the same manner as any other witness who has testified in this case. You judge their testimony in the same way, taking into account interest, or any factor which may have influenced them to color or fabricate their testimony.

Examine with care for the clean and pure motive that prompts the testimony of a witness. Just by way of illustration, I refer to the government's witness Coulson who gave what you might well consider vital testimony. What was his motive? Although the defense has not suggested it, did he perjur himself in order to get the defendant convicted? Did he perjure himself because he doesn't like the defendant's color? Was his testimony induced by an unflinching desire to do his full duty? That's for you to decide. You observed him while he testified to an extremely important segment of testimony. What is your estimate of his motive? And following that, the total weight to be given his testimony. Apply that test as well as any others that appeal to your common sense, to each witness.

Now what has the law to say when a defendant takes the stand? What has the law to say, not what you and I think. The defendant has testified. He took the stand and was sworn before you. The law permits but does not require a defendant to testify in his own behalf. The testimony of this defendant is before you.

You and only you, the jury, can determine how much credibility or believability his testimony is entitled to, or how little.

However, it is the law, and I instruct you that interest creates a motive to give false testimony, that the greater the interest, the stronger is the temptation, and that the interest of a defendant, says the law, in the result of a trial, is of the character possessed by no other witness and is therefore a matter which may affect the credence which shall be given to his testimony.

However, let me point out that the fact that the defendant has such an interest in the case does not mean that he will testify falsely. It is for you, the jury, to decide whether he testified truthfully and how much weight to give to his testimony.

After all is said and done, what do you, the jury, make of the defendant's testimony? Did he attempt to pull the wool over your eyes with a cock and bull story or, knowing in advance, as he certainly did, just what the government's proof would consist of, did he maneuver to fashion or design a defense around the government's evidence so as to explain away or lessen its impact and hope to cast an innocent aspect on incriminating proof? Or, on the other hand, was his testimony truthful and believable as it related to a likely or even an unlikely happening in which he, an innocent victim, was caught up in the web of circumstances?"

Page 334, line 7 to line 15....

"The guilt or innocence of this defendant, Mr. Foreman, and ladies and gentlemen of the jury, must be declared on each count. You must determine each count separately. You will therefore return a separate verdict with reference to each count of the indictment. Thus, for example, should you find the defendant either guilty or not guilty of one count , it does not automatically mean that you should find the defendant guilty or not guilty on the other count of the indictment."

OBJECTIONS TO CHARGE

Page 337, line 17 to line 25....

"THE COURT: Any exceptions or requests by the defense counsel?

MR. STONE: Yes. Your Honor, I renew all the objections I made yesterday, and I will again point out to the court that the government's request number 2, which was incorporated in your charge, was that the money was taken from the persons or presence of a person, namely an employee or teller of the bank in this case the teller, Tyrone Hudson. It must have been taken from Tyrone Hudson by use of force, "

(Pages 338 to 340 attached.)

Page 341, line 2 to line 7....

" were, and he was an active participant in the bank robbery. I feel that in light of the total charge it was fundamentally unfair to the defendant and I except.

THE COURT: The court will stand on the charge and thanks counsel for the polite and quiet manner in which he registered his objections. "

violence and intimidation.

I put in a request yesterday that if they felt that Mr. Hudson was a collaborator in the purloining of money from the bank, then certainly the defendant cannot be found guilty of taking the money from Mr. Hudson.

Mr. Hudson is the only person here who was an employee of the bank. Mr. Rivera, as I recall, is an employee of a private guard service guarding the parking lot, and therefore my request yesterday I should certainly reiterate today in line with what you told the jury as far as Mr. Hudson is concerned.

THE COURT: Very well.

MR. STONE: That's only one of them.

THE COURT: Go right ahead.

MR. VIZCARRONDO: May I be heard on that?

THE COURT: If you wish, certainly.

MR. VIZCARRONDO: Your Honor, the statute does not say "of the person or presence of an employee"; it says "of the person or presence of another," and it does not say that violence must be used in the taking. It is just that the violence was used in connection with the taking.

THE COURT: All right, next?

MR. STONE: I would again renew my objection as to the possession of the fruits of a crime. This is not

a charge where the defendant is accused of possessing stolen property but rather the participating in an armed bank robbery.

In order to be charged with the fruits of a crime in this particular case the defendant would have to have had knowledge in advance that the crime had been committed. The defendant would have had to have knowledge that the items he was possessing were stolen, and would have had to have proof of those facts.

None of those issues were brought forth before the jury. The mere fact that he had fruits of a crime is not evidence that he knew the crime had been committed, and shouldn't have been charged in light of the evidence in this particular case.

The charge, I think, should be given the jury that it is the knowledge of the defendant completely as to what controls in this particular case. So I would except to that portion and ask for a corrective instruction in that manner.

I would also except to your charge where one portion of reasonable doubt was referred to where you referred to there was no need for tapes, confessions or photos. I think that was an improper addition to what the normal charge is as to reasonable doubt.

I have no objection to the mathematical certainty, but to tell the jury that there aren't tapes, confessions, or photos, and therefore the government doesn't need them, I think was unfair to the defendant.

You also charged as to dangerous weapons, that it must be operable. There is no proof here or testimony that the gun in question was operable or that there were bullets involved.

I also take exception to your emphasis on Coulson's testimony as being vital. I think you used the words "extremely important segment." I feel that that is an unfair example, bringing to the jury's consideration the testimony of one person which was not brought out on my summation at all, and which I glossed over as not having importance, and I feel that for the court to emphasize Coulson's testimony in light of the charge as to the inconsistent statement of the defendant at the same time cast aspersions on the defendant's testimony and was unfair, and I except to that portion of the charge.

I also except again to the portion of the charge showing common scheme or plan. I think the total charge to the jury should be before they go into any consideration, they must find that the defendant had knowledge of the bank robbery in advance. He knew who the other participants